TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 89

J. ROBERT OGDEN, PETITIONER,

vs.

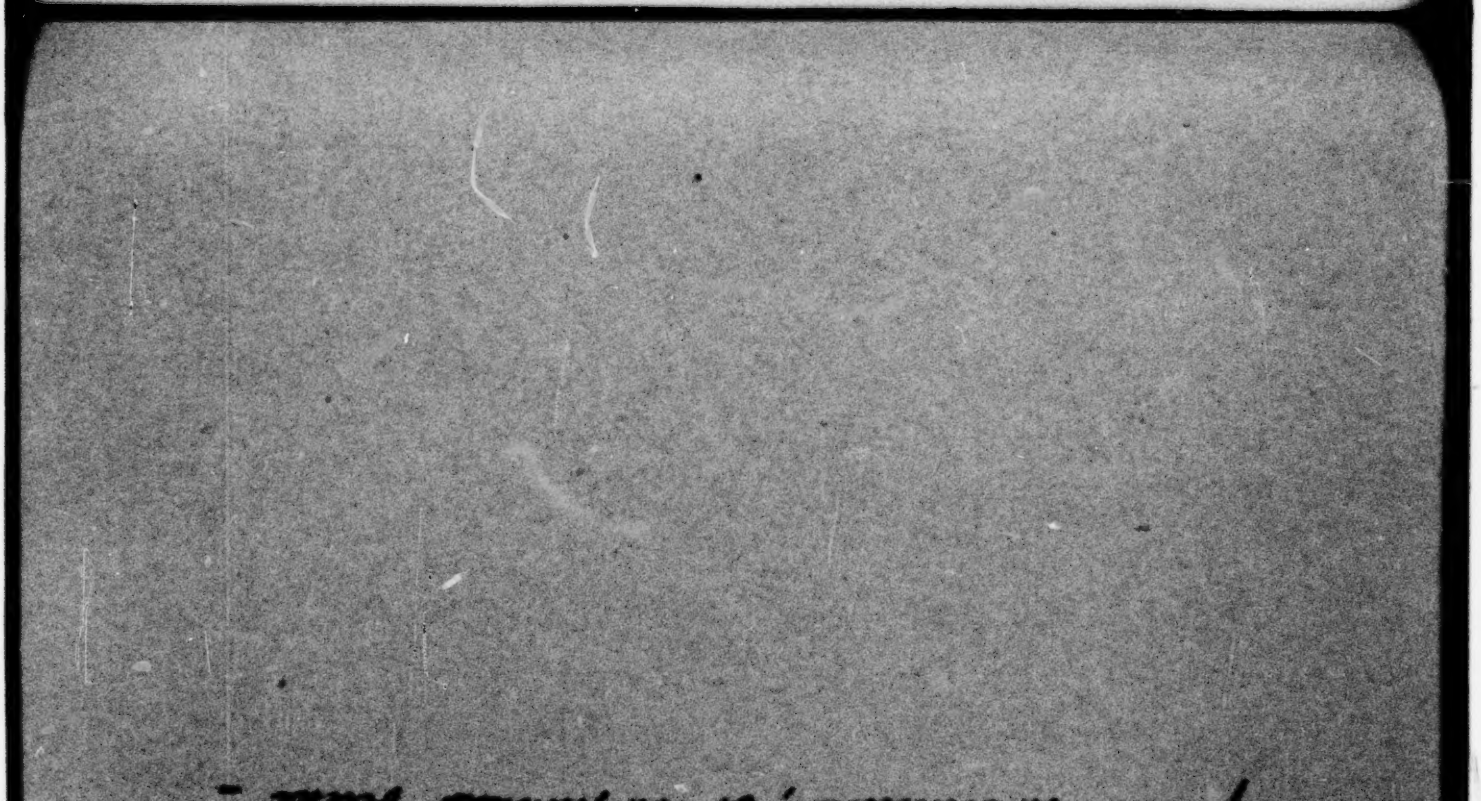
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1936

CERTIORARI GRANTED APRIL 13, 1936

(33,285)



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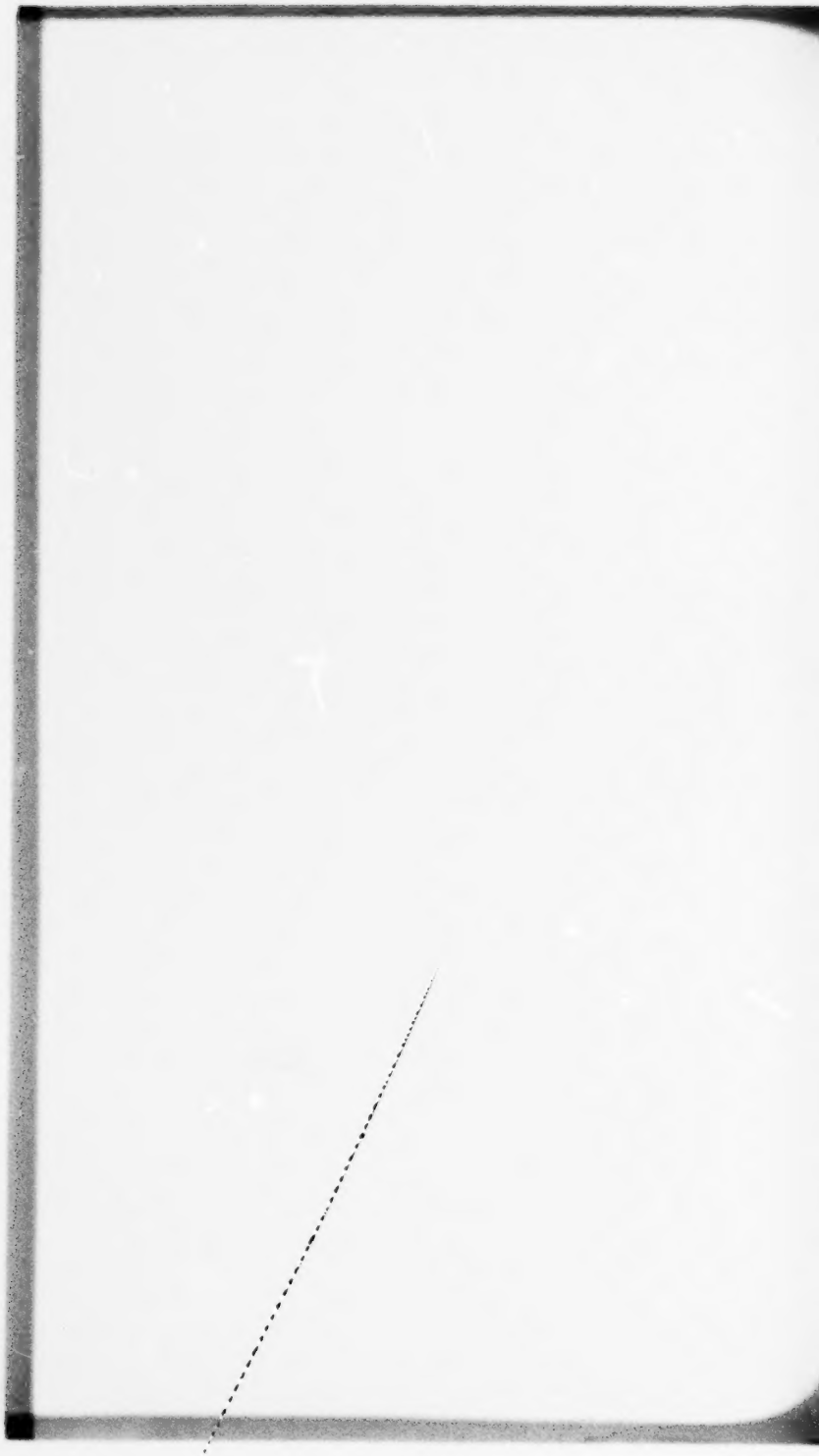

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

J. Robert Cogen et al., Plaintiff-in-Error,

against

United States of America, Defendant-in-Error

In the matter of the application for the return of certain papers, cards, memoranda and books, and other papers and memoranda seized from the person of the defendant, J. Robert Cogen and for the suppression of all evidence obtained therefrom

Writ of Error

The President of the United States to the Honorable Judges of the United States District Court for the Southern District of New York:

Because in the record and proceedings as also in the entry of an order dated January 12th, 1928, upon application by and between J. Robert Cogen, plaintiff-in-error, [fol. 2] manifest error is alleged to the great damage of the plaintiff-in-error, and willing that error if any there be should be duly corrected and full and speedy justice done, do command you that you send the record and proceedings herein with all things concerning the same to the Circuit Court of Appeals of the United States, for the Second Circuit, together with this writ, so that you have the same in said Circuit Court of Appeals at the Old Post Office Building, in the Borough of Manhattan, City of New York, within thirty days from date hereof and that the record and proceedings aforesaid being inspected that the said Circuit Court of Appeals may cause further to be done therein to correct the errors assigned.

Witness Honorable William H. Taft, Chief Justice of the United States, the 17th day of January, 1928.

Alex. Gilchrist, Jr., Clerk United States District Court.

The foregoing writ is hereby allowed.

Manton, U. S. C. J.

[fol. 3] In United States District Court

[Title omitted]

Notice of Motion for Order Directing Return of Certain Papers, Etc.

Sir: Please Take Notice that upon the annexed affidavit of J. Robert Cogen, duly verified on the 2nd day of November, 1927, the undersigned will move this Court on the 7th day of November, 1927, at the United States District Court for the Southern District of New York, Room 331 Old Post Office Building, Park Row, in the Borough of Man-
[fol. 4] hattan, City of New York, at 10:30 o'clock in the forenoon of that day or as soon thereafter as Counsel can be heard, for an order directing the United States Attorney for the Southern District of New York, and his assistants or whomsoever may have custody and possession thereof, to return all those certain papers, cards, memoranda and books, and other papers and memoranda, and all copies thereof, seized from the person of J. Robert Cogen, and for the suppression of all evidence obtained therefrom and for such other and further relief as to the Court may seem proper.

Dated New York, November 3rd, 1927.

Yours, etc., Sanford H. Cohen, Attorney for Defendant, J. Robert Cogen. Office & P. O. Address: 217 Broadway, Borough of Manhattan, City of New York.

To Charles H. Tuttle, Esq., United States Attorney.

[fol. 5] In United States District Court

[Title omitted]

Affidavit of J. Robert Cogen in Support of Motion

State of New York,
City of New York,
County of New York, ss:

J. Robert Cogen, being duly sworn, deposes and says: I am the defendant named in the above entitled action.

That on the 4th day of May, 1927, I was in the store owned and operated by one, Jacob Glasgal, having pro-
[fol. 6] ceeded to said store at the invitation and request of said Jacob Glasgal.

That while I was in said store a man whom I later learned was William H. Moore, a Prohibition Agent, came to me and asked me whether I was Cogen. I stated that I was and then, another man, whom I later learned was Prohibition Agent James J. Donovan, came up to me and proceeded to search my person and took from me various papers, memoranda, books, cards and other papers and then told me that I was under arrest. He then took me to the Old Post Office Building and while I waited in the office of an Assistant United States Attorney they drew up a complaint against me and after the said complaint was signed I was arraigned before United States Commissioner O'Neill and held under bail in the sum of Ten thousand ($10,000.00) Dollars.

At the time of the said search and seizure of the said papers, etc., which as stated herein were taken from my possession and person, there was no warrant of arrest outstanding against me nor had I committed any crime in the presence of this officer or of any other officer.

I am informed that a search of the records of the United States Commissioner shows that the only complaint signed or filed against me was the complaint which was made after my arrest and which is the one under which I was held under bail and that the said complaint was made after I was brought to the United States Attorney's Office and after the search and seizure herein mentioned.

[fol. 7] I am informed and believe that in a proceeding for the revocation of a permit of the Getsol Chemical Co., which hearing was held at the Prohibition Department, that Agent James J. Donovan was a witness at said hearing and in the course of his examination admitted that he had no warrant for my arrest and that before the said James J. Donovan saw me in the store of Glasgal he had made no effort to apprehend me.

That in the course of his testimony, Agent Donovan testified as follows, referring to my arrest as above mentioned:

"Q. When you walked in back of the store, you said, 'You are under arrest'?
A. That's right.
Q. He didn't commit any violation of the law?
A. No.
Q. And you had no warrant?
A. No."

It, therefore, appears that the said search and seizure of the papers from my person was unlawful and illegal and that the said Prohibition Agent Donovan was without legal authority to make the search and seizure under any circumstances.

I am further informed and believe that some or all of these papers, or copies thereof, have been turned over by the said Prohibition Agent, James J. Donovan, to the United States Attorney, or his Assistants, and that these papers, memoranda, books, documents, etc. are intended [fol. 8] to be used by the United States Attorney, or his Assistants, upon the trial of the Indictment now pending against me and of using the information obtained therefrom at the said trial.

I beg leave to refer to the complaint on file in the office of United States Commissioner O'Neill in support of the statements herein made.

That this affidavit is made for the purpose of the issuance of an order for the return of all the books, papers, memoranda, etc., seized, as aforesaid, together with all copies thereof, and for a further order to the United States Attorney directing him, or his assistants, not to offer the same in evidence or to offer any testimony on any transaction mentioned in any of the seized papers upon the trial, and that the said order be directed to any person who may have possession thereof, and that return thereof has already been demanded and refused.

That the said illegal search and seizure are in prejudice of my Constitutional rights and the said search and seizure was in violation thereof.

That no previous application has been made for this order.

J. Robert Cogen.

Sworn to before me this 2nd day of November, 1927. George Cohen, Notary Public, New York County. Term expires March 30, 1929. New York Co. Clerk's No. 131. Reg. No. 9145.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES J. DONOVAN IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

I, James J. Donovan, being duly sworn, deposes and says:

[fol. 10] I am a Prohibition Agent, appointed by and acting under the authority of the Secretary of the Treasury of the United States of America.

I am the Prohibition Agent who, on May 4, 1927 arrested J. Robert Cogen and swore to the complaint filed against the aforesaid J. Robert Cogen.

I am also the Prohibition Agent who testified at the revocation hearing of the P. T. Chemical Company at the Prohibition Office on July 7, 1927.

On April 25, 1927, I obtained a statement from Druggist Jacob Glasgal, 1435 Madison Avenue, New York City, that approximately over one hundred (100) whiskey prescription blanks which I had in my possession were purchased by him from J. Robert Cogen, a whiskey salesman employed by the Baltimore Distilling Company.

Mr. Glasgal stated to me that he had purchased whiskey blanks from J. Robert Cogen since about August, 1926, and that he sold practically all of his whiskey withdrawals to the aforesaid Cogen for the price of $66.00 per case.

On April 26, 1927, Jacob Glasgal handed to me twenty-four (24) uncancelled prescription blanks which he said were given to his brother, Nathan Glasgal, a clerk in the drug store, on April 25th by the aforesaid J. Robert Cogen, who had called at the Glasgal Pharmacy on April 25, 1927, while Jacob Glasgal was at the United States Attorney's Office.

Glasgal had stated that Cogen had informed Glasgal's brother that he would return on the following day (April [fol. 11] 26th) and get the whiskey. Accordingly, on April 26th, Glasgal's store was placed under observation, Agent Moore and myself waiting for Cogen to call for the whiskey. Cogen did not call at the store on this date, but on April 26th, while I was at the Glasgal store a man, who said he was Cogen, telephoned Glasgal. I was permitted by Mr. Glasgal to stand close to the receiver and overhear the conversation. This man, who alleged to be Cogen, stated to Glasgal that he had brought twenty-four (24) prescriptions to the store and given them to Glasgal's brother, but that he would not be in for the whiskey until a few days later as he wanted to see if the prohibition office was going to take any action against Glasgal. (Glasgal's brother, according to Glasgal's statement, had informed Cogen on April 25th that prohibition agents had conducted Jacob Glasgal to the United States Attorney's office after having accused him of buying stolen whiskey prescription blanks.)

On May 3, 1927, I overheard a telephone conversation to Mr. Glasgal from a man who claimed to be Cogen, that he would call for the case of whiskey on the following day, May 4th, and if Mr. Glasgal desired, bring prescription blanks covering another case of whiskey and would take that also away. Mr. Glasgal, in my presence, stated to this person, "No, don't bring any more prescriptions, one case is enough."

On May 4, 1927, accompanied by Prohibition Agent William H. Moore, I took a position in a restaurant on the northwest corner of 98th Street, opposite the Glasgal Phar- [fol. 12] macy, where I could obtain a clear view of the store. At about three o'clock, a car drove up 98th Street and stopped at the corner of Madison Avenue. Two men went from the car into the Glasgal drugstore. About one-half hour later the taller of the two men emerged from the side door of the pharmacy on 98th Street, carrying two packages wrapped in tar paper, about the size of twelve pints of whiskey each. Entering the automobile, he drove away at a great rate of speed, although I followed him in a taxicab, I was unable to intercept him.

On returning to the store I found Prohibition Agent William H. Moore standing in the front part of the drugstore

in conversation with Druggist Glasgal. Agent Moore informed me that Cogen was in the back room. I entered the back room accompanied by Agent Moore and Druggist Glasgal and asked the man if his name was Cogen. He said that it was. I thereupon proceeded to search him, after telling him that he was under arrest. I took from various inside pockets a memorandum book, cards and papers; and from his right hand overcoat pocket I took a rolled elastic tied package which, when opened, proved to be eighty-one (81) uncancelled whiskey prescription blanks.

At that time we were in possession of sufficient evidence to obtain a warrant for his arrest, namely, the affidavit of Jacob Glasgal and the affidavit of his brother Nathan Glasgal, who was alleged to have received from Cogen the [fol. 13] twenty-four (24) uncancelled prescriptions on April 25th.

I also overheard a telephone conversation to Glasgal from a person who claimed to be Cogen, discussing the stolen prescription blanks found in the Glasgal store, and also Cogen's plan of calling for the whiskey on May 4th.

James J. Donovan.

Sworn to before me this 5 day of December, 1927.
Francis A. O'Neill, U. S. Commissioner, So. Dist. of N. Y.

[fol. 14] In United States District Court

[Title omitted]

Affidavit of John J. Fogarty in Opposition to Motion

State of New York,
County of New York,
Southern District of New York, ss:

I, John J. Fogarty, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Southern District of New York, appointed by and acting under [fol. 15] the authority of the Attorney General of the United States of America.

I am the Assistant United States Attorney that presented the case of J. Robert Cogen, et al. to the United States

Grand Jury for the Southern District of New York which Grand Jury indicted Cogen and numerous others for conspiracy to violate the National Prohibition Act in that they did buy and sell in prescriptions illegally obtained.

Jacob Glasgal, a druggist, located at 1435 Madison Avenue, New York City, referred to in the annexed affidavit of Prohibition Agent James J. Donovan, came to my office and stated to me that he had purchased whiskey prescription blanks from one J. Robert Cogen since about August, 1926 and that he sold practically all of his whiskey withdrawals to the aforesaid Cogen for the price of $66.00 per case.

Glasgal also informed me that Cogen had told his Glasgal's brother that he would return on April 26 to get some whiskey which he had previously negotiated for with Glasgal.

Both Jacob Glasgal and his brother Nathan Glasgal made affidavits outlining in detail their dealings with Cogen, copies of these affidavits are on file in the United States Attorney's office.

John J. Fogarty.

Sworn to before me this — day of December, 1927.

———.

[fol. 16] In United States District Court

[Title omitted]

Reply Affidavit of J. Robert Cogen in Support of Motion

State of New York,
City of New York,
County of New York, ss:

J. Robert Cogen being duly sworn, deposes and says:—I have read the affidavit of James J. Donovan and I deny that I phoned to Jacob Glasgal on the days claimed in said affidavit.

[fol. 17] That said Agent Donovan claims in his affidavit that he saw a man, not myself, come from the side door of Glasgal's drugstore carrying two packages wrapped in tar paper about the size of Twelve (12) pints of whiskey

each. I desire to call attention to the fact that he does not claim that the packages actually contained Twelve (12) pints of whiskey or that it looked as if it contained whiskey but only contends that it looked the size of Twelve (12) pints of whiskey, which does not in any way indicate that there was any appearance about the package to give him the warrant to believe there were Twelve (12) pints of whiskey in such package.

As a matter of fact, Agent Donovan, in sworn testimony given on June 30th, 1927, at the Prohibition Department, testified as follows:

"Q. You saw one come out with a package?
A. Yes.
Q. How were they wrapped?
A. In tar paper.
Q. And tied up?
A. Yes.
Q. From where you were standing, you didn't know what was in it?
A. I didn't."

I desire further to point out that at the time of the search upon me that neither the Assistant United States Attorney nor Mr. Donovan believed that there was sufficient evidence upon which a complaint could be filed against me for the purposes of obtaining a warrant.

That this is the fact is also shown by the sworn testimony given by Agent Donovan:

[fol. 18] "Q. Did you inform any Assistant U. S. Attorney of that affidavit?
A. I did.
Q. Did you at any time swear out a complaint against Glasgal in connection with this submission?
A. No.
Q. But you told him he would not be prosecuted?
A. Assistant U. S. Attorney Fogarty told him.
Q. Before or after?
A. Before he signed the affidavit.
Q. That was in your presence?
A. That's right.
Q. And then Glasgal put this all in writing?
A. Yes.

Q. Did you ever file a complaint against Glasgal?
A. No.
Q. Has he ever been indicted?
A. No.
Q. On the 25th, did you swear to complaint against Cogen?
A. No.
Q. Did you at any time up to the 4th of May make any complaint?
A. No.
Q. Did you have any warrant for the arrest of Cogen?
A. No.
Q. Did Glasgal tell you where Cogen lived?
A. No.
Q. Do you know where Cogen lived?
A. No.
Q. Did you try to ascertain where he lived?
A. No.
Q. Did you make any effort to apprehend Cogen on this statement he has made?
A. No.
Q. No effort at all?
A. No."

[fol. 19] I reiterate what was stated by me in my original affidavit attached to the moving papers, that I was searched first and arrested after and again refer to the fact that in sworn testimony Agent Donovan admitted that I committed no violation of the law and that he had no warrant of arrest.

J. Robert Cogen.

Sworn to before me this 19th day of December, 1927. George Cohen, Notary Public, New York County. Term expires March 30, 1929. New York Co. Clerk's No. 181. Reg. No. 9145.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Hon. Charles H. Tuttle, U. S. Attorney, by Robert B. Watts, Esq., Assistant U. S. Attorney, for the United States;

Sanford H. Cohen, Esq., for Cogen.

MEMORANDUM OPINION

This motion to direct the District Attorney to return the documentary evidence seized at the time of defendant's ar- [fol. 20] rest is denied. The contention that the search and seizure was not an incident to the arrest, but rather led to the arrest I find untenable. Certainly the agents would have been remiss if they had not decided to arrest this defendant after the other man had made his escape, in view of the strong evidence that they already had against this defendant. I am convinced that the search was incident to the arrest.

The only question remaining is whether the arrest was lawful. That presents two points—1 whether the agents had probable cause for believing the defendant guilty of a felony, and 2 whether they as Prohibition Agents had the right to arrest without a warrant even though there was probable cause.

As to the first point, I do not see how counsel for the defendant can seriously urge that the agents did not have probable cause for believing defendant guilty of a felony. They had strong evidence of his guilt, even though some of it was hearsay.

As to the contention that the agents had no authority, however strong the evidence of the defendant's guilt, merely because the section defining the felony of conspiracy is found in the Criminal Code instead of the National Prohibition Act, I think that is more ingenious than sound. The motion is therefore denied.

Dated Dec. 30, 1927.

Frank J. Coleman, U. S. D. J.

[fol. 21] In United States District Court

[Title omitted]

Order Appealed From—Jan. 12, 1928

A motion having come on regularly to be heard to return certain papers, cards, memoranda and books, and other [fol. 22] papers and memoranda, and all copies thereof, seized from the person of J. Robert Cogen, and for the suppression of any evidence obtained therefrom,

Now upon the Notice of Motion dated November 3rd, 1927 and the affidavit of J. Robert Cogen duly verified on the 2nd day of November, 1927, and the Reply Affidavit of J. Robert Cogen duly verified on the 19th day of December, 1927, in support of said motion, and the affidavits of James J. Donovan and John J. Fogarty duly verified the — day of December, 1927, in opposition to said motion, and after hearing Sanford H. Cohen, attorney for J. Robert Cogen, in support of said motion, and Charles H. Tuttle, United States Attorney (Robert Watts, Esq., Assistant United States Attorney), in opposition thereto, and due deliberation having been had, and upon filing the Opinion of the Court, it is

Ordered that the said motion be and hereby is denied.

Frank J. Coleman, U. S. District Judge.

Approved as to form. R. B. Watts, Asst. U. S. Atty.

[fol. 23] In United States District Court

[Title omitted]

Petition for Writ of Error

And now comes the plaintiff-in-error, J. Robert Cogen, by his attorney, Sanford H. Cohen, and complains that in the record and proceedings in the above entitled cause and also by the order made in this proceeding and filed January 12th, 1928, in the United States District Court for the Southern District of New York against the aforesaid plaintiff-in-error, manifest error hath happened to the great damage of said plaintiff-in-error,

Wherefore the said plaintiff in error prays for the allowance of a Writ of Error and for such other orders and [fol. 24] processes as may cause all and singular the record and proceedings in said case to be sent to the United States Judges for the Circuit Court of Appeals in and for the Second Circuit under and according to the laws of the United States in that behalf made and provided, so that the same may be inspected, the said Judges of the said Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

Dated New York, January 17th, 1928.

Sanford H. Cohen, Attorney for Plaintiff in Error.
Office & P. O. address, 217 Broadway, Borough of Manhattan, City of New York.

In United States District Court

Order Allowing Writ of Error

The within Writ of Error is allowed and the trial of the plaintiff in error is stayed and the use of the records, etc., which is subject of the appeal is stayed until the determination of the appeal.

January 17th, 1928.

Manton, U. S. C. J.

[fol. 25] In United States District Court

[Title omitted]

Assignments of Error

And now comes J. Robert Cogen, plaintiff in error, and in connection with his petition for a Writ of Error, makes the following Assignments of Error, to wit:

That the Court erred in making the order dated January 12th, 1928, whereby it denied the motion to direct the United States Attorney for the Southern District of New York, and his Assisants or whomsoever may have custody and possession thereof, to return all those certain papers, cards, memoranda and books and all other papers and memo- [fol. 26] randa and all copies thereof seized from the person of your plaintiff in error and for the suppression of all evidence obtained therefrom, all upon the following grounds:

1. That there was no probable cause for believing that a felony had been committed.

2. That no felony had in fact been committed and there was no reasonable cause for believing the defendant to have committed it.

3. That the agents arrested the defendant for a misdemeanor not committed in their presence.

4. That the agents were not peace officers and could not arrest except where a felony had actually been committed and were governed by the same rules of law under which a private person may arrest another.

5. That the arrest was without a warrant and was illegal and the search and seizure was illegal.

6. That the arrest was made subsequent to the search and seizure.

7. That the alleged affidavits in the possession of the agents did not furnish proof that a felony had been committed.

8. That the affidavits in the possession of the agents were not in proper form upon which a warrant could issue.

[fols. 27 and 28] 9. That the affidavits, etc., did not furnish the agents with probable cause to believe a felony had been committed.

10. That the search and seizure herein violated the rights of the plaintiff in error herein under the Fourth Amendment of the Constitution of the United States for it was without probable cause.

Wherefore the plaintiff-in-error prays that the order of the District Court be reversed.

Sanford H. Cohen, Attorney for Plaintiff-in-Error, Office & P. O. Address, 217 Broadway, Borough of Manhattan, City of New York.

Citation, in usual form, omitted in printing.

[fol. 29] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated January 28th, 1928.

Sanford H. Cohen, Attorney for Plaintiff-in-Error.
Charles H. Tuttle, U. S. Attorney, Attorney for Defendant-in-Error.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] In United States Circuit Court of Appeals for the Second Circuit

J. Robert Cohen, Plaintiff-in-Error,

against

United States of America, Defendant-in-Error.

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges.

Opinion

Writ of error to the District Court for the Southern District of New York to review an order denying a motion to return certain papers found upon the person of the defendant at the time of his arrest.

The plaintiff-in-error was arrested without warrant in a drug store by a prohibition agent, the nature of the charge,

if declared at all at the time, not appearing in the record. A complaint was then sworn out against him, the contents of which also does not appear, and later he was indicted for a conspiracy to violate the National Prohibition Law. At the time of his arrest, but whether before or after it was made is in dispute, the agent searched his person, and in his pockets found a memorandum book, certain cards and papers and a package of eighty-one uncancelled whisky [fol. 32] prescription blanks. These the agent seized and delivered to the district attorney for use upon trial of the indictment.

The plaintiff-in-error then moved upon affidavit in the District Court to compel the district attorney to return the papers and to suppress their use as evidence. The grounds for this motion were that he was unlawfully arrested, and that in any event he was searched before his arrest. The district judge decided both points against him and denied the motion.

Sanford H. Cohen, for the Plaintiff-in-Error.
Robert B. Watts, for the Defendant-in-Error.

L. Hand, circuit judge:

Papers, like other chattels, can ordinarily be recovered only by some possessory remedy such as replevin; we have to do neither with that, nor with a bill in equity for the same relief. This case comes up upon motion in the criminal prosecution then pending, and while we attach no significance to the way in which the papers are entitled, it is plain that unless the motion lay as an independent proceeding, it was but a step in the defense and the order is not a "final decision" under Section 128 of the Judicial Code. Under Section 16 of the Search Warrant Act upon the return of the executing officer the judge or commissioner allowing the writ is to restore property unlawfully seized. Such an order after indictment was treated sub silentio as a "final decision," in Steele v. U. S., No. 1267 U. S. 498, and in In Re No. 21 Front Street, 5 Fed. (2) 282, (C. C. A. 2), and U. S. v. Kirschenblatt, 16 Fed. (2) [fol. 33] 202, (C. C. A. 2), we did the same. As search warrants are almost invariably issued before indictment, it is probable that in all these cases the warrants had issued before the indictments were found, but that circumstance

was not considered. In Re Hollywood, 5 Fed. (2) 651, (C. C. A. 2), seems not to have involved any prosecution. On the other hand, in Coastwise, etc., Co. v. U. S., 259 Fed. Rep. 847 (C. C. A. 2), we held that an order upon search warrant issued before indictment was not appealable if entered after indictment found, and the same was ruled by the Ninth Circuit in Jacobs v. U. S., 8 Fed. (2) 981, distinguishing Steele v. U. S., because in that case no suppression of the evidence had been asked. See also U. S. v. Mattingly, 285 Fed. Rep. 922, (C. A., D. C.). We need not now consider how far the last three cases can stand after Steele v. U. S., or whether it makes any difference that a prayer is added for the suppression of the evidence. It is enough that the order at bar did not determine a search warrant proceeding.

In Essgee Company v. U. S., 262 U. S. 151, an order was reviewed which after indictment denied the return of papers produced in compliance with a subpœna duces tecum issued by the grand jury. The point was again assumed without discussion, and the case is in any event to be distinguished in that the motion was a determination of a proceeding commenced by the court's writ. In this regard it was like a search warrant, though issuing as of course. No doubt a court has always supervision over the [fol. 34] execution of its writs, Wise v. Henkel, 220 U. S. 556, 558, and its orders may perhaps be treated as final which dispose of them.

Again the motion was not made and decided before indictment found to compel the district attorney to return papers unlawfully seized, like Perlman v. U. S., 247 U. S. 7 and Burdeau v. McDowell, 256 U. S. 465; or after the indictment had been quashed, In Re Brenner, 6 Fed. (2) 425, (C. C. A. 2). Dowling v. Collins, 10 Fed. (2) 62, (C. C. A. 6), arose upon orders made after search warrant and moreover the chattels seized had a value quite independent of their use as evidence. Possibly in such a case an order even though not disposing of a writ should be treated as final, because it determines the title to the property. In the case at bar no writ had issued and the property, so far as appears by the record, was of no value except as evidence on the trial. A motion to suppress and surrender the evidence, made after indictment in such a case, appears

to us no more than a step in preparation for the trial and the order as interlocutory.

Appeal dismissed.

[fol. 35] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Concurring Opinion

Manton, circuit judge (concurring):

The order appealed from denied the application of the plaintiff in error for the return of papers, cards, memoranda and books seized from his person. It directs their suppression as evidence which might be offered upon the trial of an indictment found against him by the Grand Jury. The order is not appealable because it is interlocutory and not final. It was not an independent proceeding. The application for their return, as unlawful, in violation of the constitutional rights of this plaintiff in error, was prosecuted as an incident to the pending criminal proceedings. If it were an independent proceeding, the order is final and appealable under 225 of Title 28 of the United States Annotated Code.

The mere fact that criminal proceedings were pending prior to the petition for the return of the papers is not of itself conclusive on the question of whether the petition enters the criminal prosecution, nor would the fact that the [fol. 36] property was seized pursuant to a search warrant make the proceeding for the return of such property a special proceeding. Where the petition is directed to the warrant itself, and seeks the return of property seized thereunder, it is a special proceeding and the pendency of the criminal action is unimportant. Steele v. United States, 267 U. S. 505; United States v. Kirschenblatt, 16 Fed. (2nd) 202. Similarly where property is obtained under subpœna duces tecum. Essgee Co., etc., v. United States, 262 U. S. 151. But where the application attacks the warrant demanding a return of the property and seeks to suppress the property seized as evidence then, if there be a criminal action pending, the application must be regarded

as within the criminal proceeding and the order entered is interlocutory. Jacobs, et al. v. United States, 8 Fed. (2nd) 981; Coastwise Lumber & Supply Co. v. United States, 259 Fed. 847. In Kirwin v. United States, 5 Fed. (2nd) 282, we reviewed an application made during the pendency of a criminal action which sought to vacate a search warrant and incidentally asked for the suppression of any information obtained therefrom. There the application was begun under a separate and independent title and was intended primarily to attack the validity of a search warrant. Of course, if there be no criminal action pending, it would follow that an application respecting an alleged illegal search warrant is a special proceeding. Burdeau v. McDowell, 256 U. S. 465; In re Hollywood Cabaret, etc., 5 Fed. (2nd) 651. So where the application is made by a third [fol. 37] party asserting that his property has been wrongfully seized, an order entered is final and appealable and it is immaterial whether criminal proceedings are pending or whether search was made pursuant to an alleged illegal arrest or alleged illegal search warrant. Pearlman v. United States, 247 U. S. 7.

At bar, the papers were seized pursuant to a claimed illegal arrest. The application not only asked for the return of the papers, but for their suppression as evidence, and it is clear that the application was in the criminal action and the order entered is interlocutory and not appealable.

The appeal should be dismissed.

[fol. 38] In United States Circuit Court of Appeals, Second Circuit

J. Robert Cohen, Plaintiff-in-Error,

v.

United States, Defendant-in-Error.

Error to the District Court of the United States for the Southern District of New York

Decree—Filed Feb. 29, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

[fol. 39] On consideration whereof, it is now hereby ordered, adjudged, and decreed that the appeal from said District Court be and it hereby is dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[File endorsement omitted.]

[fol. 40] Certificate of Wm. Parker, clerk of U. S. C. C. A., Second Circuit, to foregoing transcript omitted in printing.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,285. U. S. Circuit Court of Appeals, Second Circuit. Term No. 89, J. Robert Cogen, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed March 9th, 1928. File No. 33,285.